IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

For the Ninth Circuit.

SAMUEL COULTER,
Plaintiff in Error,
vs.
JOHN A. STAFFORD,
Defendant in Error.

No. 60

Writ of Error to the United States Circuit Court for the District of Washington.

Petition of Defendant in Error for Rehearing in Circuit Court of Appeals.

BATTLE & SHIPLEY,
Attorneys for Defendant in Error.

LOWMAN & HANFORD S. & P. CO., SEATTLE.

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No. 60

Error to the Circuit Court of the United States for the District of Washington, Northern Division.

Petition to the Circuit Court of Appeals, by Defendant in Error, for a Rehearing in said Cause.

To the Honorable Circuit Court of Appeals for the Ninth Circuit:

Comes now the above named defendant in error, John A. Stafford, by his attorneys, Battle & Shipley, and respectfully petitions your Honorable Court that a re-

hearing may be granted unto him in the above numbered and entitled cause, and as grounds for his said petition says:

This action was begun by said plaintiff in error to recover possession of certain real estate, situate in the city of Seattle, plaintiff claiming to be the owner thereof in fee simple, deraigning title thereto by sundry mesne conveyances from a patentee of the United States.

The said defendant is, and since about the first of October, 1886, has been in the actual, continuous, adverse and exclusive possession thereof, claiming title by virtue of a tax deed to him executed by the Sheriff of King county, Washington Territory, on the 14th day of July, 1886, pursuant to a sale in 1883 for the taxes of the year 1882 of these lands, together with other lands not embraced in the premises for the recovery of which this particular action at law was brought; said other lands having been previously sold by defendant to third parties, against whom a separate action is now pending and undisposed of.

The cause was tried in the Circuit Court for the Northern Division of the District of Washington, on the 4th day of June, 1891, before the Hon. C. H. Hanford without a jury, as per stipulation of the parties. The decision of the cause and opinion of the Circuit Court rendered thereon were rendered and filed therein on the 27th day of November, 1891.

The findings of fact, conclusions of law and judgment were subsequently filed on, to-wit—the 7th day of December, 1891. (See printed record, pp. 53-63). Prior to and upon the date of the trial of this cause, certain general rules of practice then were and ever since have

been in force in said United States Circuit Court for the state of Washington regulating the preparing and settling of bills of exceptions, etc; which said rules are numbered respectively Nos. 26 and 55. (See printed record, pp. 77-79).

Plaintiff in error, neither during the trial nor subsequent thereto, took any of the proceedings prescribed by said rules to settle a bill of exceptions within the period thereby limited, neither did he ask for or procure any extension of time within which to do the same.

Upon the presentation of the bill of exceptions set forth in printed record, pages 75 and 79, inclusive, which were not presented to the Court until the 3rd day of June, 1892, objection was made to the settlement thereof by defendant on the ground and for the reason that the plaintiff had not complied with said rules, 26 and 55, but the Court, without passing upon the objection, ordered the same, together with a copy of said rules to be inserted in the bill of exceptions, that the question might be passed upon by the Appellate Court.

Defendant in error duly served and filed in the Circuit Court of Appeals, prior to the hearing of this cause therein, a motion to strike from the records and files of this cause the said bill of exceptions for non-compliance by plaintiff with the rules aforesaid. (See defendant's brief, pp. 2 and 4–7).

This petitioner respectfully represents and shows unto the Honorable, the Circuit Court of Appeals for the Ninth Circuit, for his first reason or ground for the granting of a rehearing herein the following, to-wit: That no bill of exceptions was ever properly settled in

this cause, and defendant's motion to strike the same should be granted by this Honorable Court.

Petitioner further shows that this cause was presented on oral argument to the Honorable Court at the July term, 1892, and an opinion was handed down the 8th of May, 1893, and further that said motion to strike said bill of exceptions, which was submitted at the same time as the cause on its merits, has not been passed upon.

In support of petitioner's contention that there is no proper bill of exceptions in this cause, and that plaintiff must consequently fail upon his appeal hereof, we call attention to the fact that the term during which this cause was tried expired in December, 1891, and that the decision of the Trial Court was rendered November 27, 1891, and opinion filed of that date, although the judgment appealed from by plaintiff in error was not filed till December 7th, 1891, after the commencement of the next term. Also that no steps whatever were taken to prepare or settle a bill of exceptions until June 3, 1892, during the term following that in which the trial was had and one year thereafter.

In the absence of a rule or order restricting or enlarging the time within which exceptions must be signed, the same may be signed any time during the term.

Foster's Federal Practice. 2nd Ed. Vol. II, §377.

The manner or time of taking proceedings as a foundation for the removal of a cause from one Federal Court to another by a writ of error is to be regulated exclusively by acts of Congress "or from the rules of practice of the Courts of the United States. . . . .

The rules of the Circuit Court clearly contemplate proceedings to perfect a bill of exceptions within the time limited by those rules, without reference to the expiration of the term."

Ex parte Chateaugay Ore & Iron Works Co., petitioner 128 U. S. 544.

The signing by the Court of the bill of exceptions was a nullity, as the rules had not been complied with, nor was the same done during the term at which trial was had and decision rendered.

Herbert vs. Butler, 14 Blanchford 357.

The time within which exceptions may be drawn out and signed depends upon the rules of the Court, in particular as said rule No. 26, among other things, provides, "In all cases where a party . . . fails to present his bill . . . to the Judge for allowance or rejection within the time limited as aforesaid, his bill of exceptions shall be deemed abandoned and his rights thereto waived." (Record pp. 77-79).

Sweet vs. Perkins, 24 Fed. 777.
Dredge vs. Forsythe, 2 Black 568.

The facts in this case do not present the ordinary case of hardship for the owner of the legal title whose property is taken by a purchaser at a tax sale for a mere song. As appears from the findings of fact filed by the Court, the defendant paid the full value of the property to secure his tax title, cleared and improved the land so purchased by him and has dwelt thereon in person since the early part of 1887, while the plaintiff purchased his alleged title subsequently with, full knowledge of defendant's ownership. (Record pp. 59-60).

For the foregoing reason, we the more strongly urge upon the Honorable Court that a rehearing be granted herein and that the defendant's motion to strike said bill of exceptions be more fully considered.

As further authorities in support of said motion, we cite as bearing out petitioner's contention:

Muller vs. Ehlers, 91 U. S. 249.

Hunnicutt vs. Peyton, 102 U. S. 333.

Richmond & D. R. Co. vs. McGee et al., 50th Federal, 906, and authorities cited therein.

Libby vs. Crossley, 40 Fed. 564.

Marine City Stave Co. vs. Herreshoff Mfg. Co., 32 Fed. 822.

Under the foreging authorities, it is submitted by petitioner that there are no exceptions before the Honorable Circuit Court of Appeals upon which plaintiff can contest the judgment rendered in the Lower Court, and that said judgment should be affirmed.

Said defendant in error further petitions this Honorable Court for a rehearing in this cause, and for a further consideration of the same by the Circuit Court of Appeals upon the merits for the reason that since this case was submitted in 1892, and prior to the handing down of the opinion of the Court herein, the Supreme Court of the state of Washington has rendered a decision establishing a rule of property under the statutes of this state relative to tax titles within the state of Washington which is at variance with the conclusions arrived at by the Honorable Circuit Court of Appeals in this cause. In order that we may not have a state of affairs presented of the Federal Courts enforcing one

construction of a state statute, while the Courts of the state follow a diverse one upon the same question, we feel it to be defendant's duty to ask for a further consideration of the matters involved in this cause. As said by the Court in its opinion heretofore rendered in this cause, "The Supreme Court of the United States in its decisions has followed the constructions of the statute given by the state Court from which the case came, wherever the question had been previously passed upon by the state Court." The United States Supreme Court has held that "The Courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statute of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. . . . The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text."

Leffingwell vs. Warren, 2 Black 599.

Citing numerous authorities the Supreme Court in the same case says: "If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications," citing,

United States vs. Morrison, 4 Peters 124.

Green vs. Neal, 6 Peters 291.

In the case last cited the Supreme Court, after reciting the fact that the Federal Courts had followed a line of prior decisions of the State Supreme Court of Tennessee which were no longer followed in the state

Courts, further says: "It therefore follows that the occupant whose title is protected under the statute, before a state tribunal is unprotected by them before the Federal Courts." Again on page 300 the Court says: "Here is a judicial conflict arising from two rules of property in the same state, and the consequences are not only deeply injurious to the citizens of the state, but calculated to engender the most lasting discontent." This case having been remanded for re-trial, by which rule of property is the trial Court to be controlled, that of the Courts of the state in which the land is situated or by that announced in the opinion rendered in this cause? We respectfully submit that it is essential to the harmony of judicial action, and to the best interests of the citizens of the state that there be but one rule of property within the state of Washington. In Fairfield vs. Gallatin County, 100 U. S. 52, the Supreme Court says: "We recognize the importance of the rule, *stare decisis*. We recognize also the other rule, that this Court will follow the decisions of state Courts giving a construction to their constitutions and laws, and more especially when those decisions have become rules of property in the state. . . . And it has been held that this Court will abandon its former decision construing a state statute, if the state Courts have subsequently given it to a different construction," citing Green vs. Neal, *supra*, and other cases.

Defendant in error submits that the foregoing decisions will be followed, especially where no property rights have been acquired under the Federal decisions.

If defendant in error can show that, prior to the decision of this case by the Honorable Circuit Court of

Appeals, on the 8th day of May, 1893, the Supreme Court of Washington, in construing the same statutes of the state, had prior to said date, but unknown to the Circuit Court of Appeals, placed a different construction thereon, and which, if followed, would require a conclusion to be reached adverse to that arrived at in said opinion herein of May 8th, 1893, then we submit that under the above authorities this Honorable Court will be justified in granting a rehearing in this case.

The facts in this case show all the equities to be with the defendant in error; at the time of his purchase of the land it was wild, unoccupied and unimproved, and he paid the full value thereof, entered into possession thinking that his acts had been in full compliance with the law, and that the period of redemption had expired and his title was secure.

Not only does the title to defendant's home hang upon the decision of this case, but in addition thereto, if the decision reached by the Honorable Court herein is allowed to stand, the evident purpose of legislative enactments authorizing the enforcement of tax collections by making sales of real property on account of delinquency, will be rendered of no avail. The construction placed upon the limitation laws of Washington in this case, if adhered to and followed, will cause a tax title to be no title at all. The Supreme Court of Washington in the case of Ward vs. Huggins, Pacific Reporter, vol. 32, p. 741, says, that it was to remedy this undesirable state of affairs, that the legislatures of the various States have enacted statutes making tax deeds *prima facie* or presumptive proof of the regularity and legality of the preliminary proceedings, etc.

As appears from the findings of fact herein (record, pp. 54–61) the plaintiff is the owner of the land in question, unless the defendant acquired a valid title by the tax sale and sheriff's deed, or unless this action is barred by the statute of limitations. In effect we understand that the conclusions reached in this case by the Honorable Circuit Court of Appeals, are that defendant's tax deed is void upon its face, and therefore not admissible in evidence for the purpose of explaining defendant's possession, and not being color of title, was insufficient to start the statute of limitations running in his favor. With due deference to the able opinion rendered herein on May 8th, 1893, the defendant in error respectfully calls to the attention of the Circuit Court of Appeals the fact that the Supreme Court of Washington did, upon the 23d day of February, 1893, in Ward vs. Huggins, *supra*, in construing section 2939 of the Code of Washington, hold, "That a void tax deed is color of title, sufficient to sustain the bar of the statute of limitations, provided for actions relating to tax deeds," citing with approval the opinion rendered in this case by the Circuit Court, as reported in 48 Fed. Rep., p. 266.

Ward vs. Huggins, *supra*, was a case in ejectment, and the defendant therein relied upon a tax deed, together with possession thereunder for over three years, pleading the statute of limitations as set forth in section 2939 of the Code; the plaintiff therein contended that, even if defendant's tax deed was competent evidence of title, that the Court should have permitted him to prove upon the trial, that said tax deed was invalid for various reasons, which are set forth in the opinion of the Supreme

Court. The trial Court held that the action was barred by the statute of limitations, and that the testimony offered was therefore immaterial. The plaintiff in said case further contended that defendant's deed was void upon its face, "and that there is therefore nothing upon which the statute of limitations can act." The Supreme Court, in the opinion rendered in the case, uses the following language: "And if it was a void instrument, it would still constitute such color of title in the respondent as would sustain the bar of the statute of limitations provided for actions relating to tax deeds. . . . We are aware that there are cases holding that a void tax deed will not constitute a basis for the running of the statute of limitations, but we think such decisions overlook both the philosophy and the object of such statutes. . . . A perfect title needs no extraneous aid, and if imperfect ones are not within the purview of the statute, then the law, in either case, is entirely ineffectual and useless, and might well be eliminated from the body of the statute."

Further in the same case the Supreme Court, citing Blackwell on Tax Titles (5th Ed.), vol. 2, § 861, says: "Whether the deed be void on its face or not, if it is a deed, and of such a character that an ordinary purchaser, unskilled in the learning of the law, might believe it to be a good conveyance, it will be sufficient." Citing further to same effect,

Coulter vs. Stafford, 48 Fed. Rep. 266.
Edgerton vs. Bird, 6 Wis. 512.
Knox vs. Cleveland, 13 Wis. 274.
Oconto Co. vs. Jerrard, 46 Wis. 317.
Lindsay vs. Fay, 25 Wis. 460.

Pillow vs. Roberts, 13 How. 477.
And others.

The Supreme Court in the same opinion, after quoting from the case of Pillow vs. Roberts, *supra*, at some length, further adds: "A statute similar to ours has been many times construed by the Supreme Court of Wisconsin, and it is there held that the only condition of things to which the statute will not apply is want of authority in the taxing officers to put the taxing powers in motion." We submit that the foregoing case, if followed by the Federal Court, establishes a rule which would require in this case a decision by this Honorable Court different from that reached in the opinion of this Court of May 7th, 1893.

As shown in their opinion in Ward vs. Huggins, *supra*, the Supreme Court of Washington has followed the decisions of the Supreme Court of Wisconsin, the decisions of which last named state have been affirmed by the Supreme Court of the United States in Pillow vs. Roberts, 13 Howard 477 (which case was cited with approval in Wright vs. Mattison, 18 Howard 50), also in Leffiingwell vs. Warren, 2 Black 509; wherefore defendant in error contends that under the decisions of the Supreme Court of Washington he is entitled to have his title held good under the said statutes of limitation, and as he further knows that the decision adverse to him, which was rendered herein by the Honorable Court, was so rendered without any knowledge of the fact that the Supreme Court of this state had so decided, he respectfully petitions that a rehearing be granted unto him; and for the additional reason that he may be given

further opportunity to present argument to the effect that his tax deed is not void on its face, in ~~this~~ which particular, defendant contending that his deed recites and contains all the matters and things which the laws of Washington require in a tax deed. On the last point defendant cites as authority the case of Ward vs. Huggins, *supra*, in which case is to be found a statement of what a tax deed should contain, all of which matters and things so specified we submit were contained in defendant's deed, as appears from the findings of fact. (Printed record, 54-63).

All of which is respectfully submitted by petitioner.

JOHN A. STAFFORD,

Petitioner and Defendant in Error.

We hereby certify that we, the undersigned, are the attorneys and counsel of the above named defendant in error and petitioner, and that in our opiniong the foregoing petition for a rehearing is well founded in point of law, and we further certify that the same is not presented or filed for purpose of delay.

BATTLE & SHIPLEY,

Attorneys for Defendant in Error and Petitioner.